No. 21809

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEFFERSON SAVINGS AND LOAN ASSOCIATION,
Appellant,

vs.

LIFETIME SAVINGS AND LOAN ASSOCIATION,
Appellee.

APPELLANT'S PETITION FOR REHEARING.

McKENNA & FITTING,
LES J. WEINSTEIN,
AARON M. PECK,
427 West Fifth Street,
Los Angeles, Calif. 90013,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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To the Honorable Frederick G. Hamley, James M. Carter, and Russell E. Smith:

Jefferson Savings and Loan Association ("Jefferson"), Appellant in the within Appeal, respectfully petitions this Court pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit to grant a rehearing in order to reconsider its judgment in the within Appeal, rendered on June 6, 1968.

The judgment of this Court, which increased the sum awarded to Jefferson by the District Court from $23,324.36 to $31,099.15, rests upon general trust principles. While Jefferson does not dispute the correctness of the Court's analysis *per se,* it respectfully submits that the decision improperly limits Jefferson's recovery. Under the terms of the written contract (the "LPA") governing the respective rights and duties of Jefferson and the appellee herein, Lifetime Savings and Loan

Association ("Lifetime"), with respect to the five properties in question, *as understood and interpreted by the parties,* including Lifetime [see Findings of Fact 12 and 13, C. T. p. 207, line 27, to p. 208, line 10] and *as construed by the District Court* [C. T. p. 213, lines 20-26], Jefferson is entitled to recover from Lifetime 75% of the selling price of the five properties, $37,-087.50,[1] less costs and expenses of sale of $325.85, or $36,761.65.

The District Court found—and Lifetime did not appeal from this portion of the judgment or question its counterpart in the conclusions of law—that:

> "In the event that Lifetime sells or otherwise disposes of any real property which had formerly secured the payment of any loan included within the LPA and which property had been acquired through foreclosure proceedings by Lifetime pursuant to the terms and provisions of the LPA, without the written consent of Jefferson, *Jefferson is entitled to an immediate payment of 75% of the net sales proceeds obtained for such property by Lifetime.*" [C. T. p. 210, lines 26-31 (comma between "LPA" and "without" omitted); p. 213, lines 20-26; emphasis added].[2]

This Court failed to award Jefferson 75% of the net credit price of the five properties because of its view that "net proceeds" of sale was something other than

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[1]The selling price of the five properties was $49,450.00.

[2]The District Court limited Jefferson's award to 75% of 75% of the so-called "ninety day price" of the subject properties only because it was laboring under what this Court recognized to be an erroneous conception of the doctrine of estoppel. (Opinion, pp. 3-4).

"net selling price." (Opinion, pp. 4-5).[3] This view is incorrect.

The judgment of the District Court gave effect to the understanding of the parties themselves as to their respective rights and duties under the LPA; and the term "net proceeds" was used and understood *by Lifetime itself* to refer to the amount due to Jefferson on a *credit* sale of foreclosed property. In a transaction directly related to and substantially contemporaneous with the sale of the five properties in question, Lifetime sold, to the same purchaser, David and Alberta Durham, three other foreclosed properties subject to the LPA. The sole consideration which Lifetime received in that related transaction was a promissory note and deed of trust securing payment of the note [R. T. p. 73, lines 14-24; p. 117, line 25, to p. 119, line 7; Ex. 8]. Lifetime's remitted 75% of the net sales price to Jefferson. The remission was accompanied by Lifetime's statement [Ex. 14] to Jefferson, which described the sales price (less certain costs and expenses of sale) as the "Net Proceeds" of the sale and the amount remitted to Jefferson as "75% of Net Proceeds."[4] Hence, 75% of

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[3]Since the "ninety day price" never became operative, the selling price of the properties in question was the so-called long-term, or credit, price.

[4]The entire transaction is recorded in Findings of Fact 12 and 13, the accuracy of which is undisputed:

"12. On or after August 6, 1964, Lifetime entered into a written agreement with David and Alberta Durham wherein Lifetime agreed to sell and convey to the Durhams those three parcels of real property which had formerly secured loans 479, 480 and 481, and in consideration therefor, the Durhams agreed to give to Lifetime their promissory note in

(This footnote is continued on the next page)

the net proceeds was, *according to Lifetime's own understanding, terminology, and conduct* 75% of the selling price.

In summary, Jefferson respectfully submits that the terms of the LPA compel an award to Jefferson of $36,761.65.

McKenna & Fitting,
Les J. Weinstein,
Aaron M. Peck,
By Aaron M. Peck,
Attorneys for Appellant.

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the sum of $70,000.00 and a first deed of trust on the three parcels. On or about August 19, 1964, the sale escrow was closed on this transaction and the conveyance and sale consummated. The aforementioned sale to the Durhams was consummated by Lifetime's furnishing to the Durhams 100% financing in the form of a $60,000.00 loan together with a $10,000.00 construction loan fund, the latter to be used by the Durhams to refurbish the three parcels of property. The total of said loan amounted to $70,000.00.

"13. On or about August 25, 1964, Lifetime paid to Jefferson 75% of the net sales price received from the Durhams in connection with the sale of the real property which had formerly secured Loans 479, 480 and 481, which sum amounted to $45,092.80." [C. T. p. 207, line 27, to p. 208, line 10]. The excess over 75% of $60,000 is accounted for by the proceeds of an insurance claim for damage to the property [Ex. 14].

Certificate.

I certify that in my judgment the within Petition is well-founded and is not interposed for delay.

AARON M. PECK